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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 896

FAITOUTE IRON & STEEL COMPANY, THE HOWARD SAVINGS INSTITUTION, FLORENCE W. FAITOUTE, ET AL.,

Appellants,

vs.

CITY OF ASBURY PARK, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

STATEMENT AS TO JURISDICTION.

ARTHUR T. VANDERBILT,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

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FAITOUTE IRON & STEEL COMPANY, A CORPORATION, AND THE HOWARD SAVINGS INSTITUTION, A CORPORATION OF THE STATE OF NEW JERSEY; FLORENCE W. FAITOUTE, CLAIRE FAITOUTE WHITE, AND WILLIAM G. CARTER, EXECUTORS OF THE ESTATE OF MOSES W. FAITOUTE,

Plaintiffs-Appellants,

vs.

CITY OF ASBURY PARK, A MUNICIPAL CORPORATION,

Defendant-Respondent.

STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Appellants contend that the basis upon which the Supreme Court of the United States has jurisdiction to review on appeal the judgment of the Court of Errors and Appeals of the State of New Jersey in this cause is:

1. The statutory provisions sustaining the jurisdiction are found in Title 28, U. S. Code, Section 344(a), pp. 205,

206 (Act of February 13, 1925, c. 229, Section 1, 43 Stat. 937):

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

and in Title 28 U. S. Code, Sections 861(a) and 861(b), Act of January 31, 1928, c. 14, Section 1, 45 Stat. 54; Act of April 26, 1928, c. 440, 45 Stat. 466:

> "861 (a). Writ of error abolished; substitution of appeal. The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

> "861 (b). Statutes governing writs of error to apply to appeals. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error."

2. The statute of the State of New Jersey, the validity of which is involved, is Article 7 of Chapter 27 of Title 52 of

the Revised Statutes of New Jersey, which Article comprises Sections 52:27-34 through 52:27-39. The Article is entitled "Adjustment or Composition of Claims of Creditors" and was originally enacted on June 27, 1933, Chapter 331 of the Laws of New Jersey of 1933, as a supplement to the Municipal Finance Commission Act, Chapter 340 of Laws of New Jersey of 1931, as amended, now Chapter 27 of Title 52 of the Revised Statutes of New Jersey. The statute provides:

> "52:27-34. *Petition by creditors; plan of adjustment or composition; parties; notices.* Upon the verified petition of any creditors of a municipality in which the commission shall function, made on behalf of themselves and all other creditors of the municipality, for the approval of a plan of adjustment or composition of the claims of all creditors or of a class or classes of them similarly situated, which plan shall be submitted with and made a part of the petition, the supreme court by a justice thereof may take jurisdiction of the subject matter and order the filing of the petition in the office of the clerk of the supreme court.
>
> "The municipality and the commission shall be made parties to such proceeding. All creditors of the municipality shall be made parties thereto by notice to be published and given in such manner as the supreme court by its justice may direct. Any creditor of the municipality may appear and assert his rights.
>
> "52:27-35. *Allegations in petition.* In the petition the creditors shall allege that the municipality is or will be unable to pay in full according to their terms the claims proposed to be adjusted or composed and perform its public functions and preserve the value of property subject to taxation, that the adjustment or composition proposed in the plan is substantially measured by the capacity of the municipality to pay, is in the interests of all the creditors affected thereby, and is not detrimental to other creditors of the municipality.

"52:27-36. *Approval by supreme court justice of plan of adjustment or composition: findings.* In any such proceeding, after hearing on the plan proposed or on the plan as modified by order and if such plan as proposed or modified is approved in writing by creditors representing eighty-five per cent in amount of the indebtedness affected thereby, and by the municipality and the commission, the supreme court by a justice thereof may by order authorize and approve such adjustment or composition if the court by its justice determines (1) that the municipality is unable to pay in full according to their terms the claims proposed to be adjusted or composed, and perform its public functions and preserve the value of property subject to taxation, (2) that the adjustment or composition is substantially measured by the capacity of the municipality to pay, (3) that it is in the interest of all the creditors affected thereby, and (4) that it is not detrimental to other creditors of the municipality.

"52:27-37. *Approved plan binding on all creditors; substituted obligations.* The plan of adjustment so authorized and approved shall forthwith and without any further action of any kind be binding upon all the creditors included in the plan, whether or not they appear in the proceeding. In so far as said plan provides for the substitution of any new bonds, notes or other obligations of the municipality in place of any outstanding bonds, notes or other obligations, or claims then outstanding, such substitution shall be effectual from and after such date as may be fixed in such order.

"52:27-38. *Continuance of stay of proceedings against municipality; action by creditor to enforce claim restricted.* After the institution of any proceeding provided for by this article and pending the determination thereof, the supreme court by a justice thereof may by order continue the stay provided by sections 52:27-32.1 and 52:27-33 of this title.

"In the event that a plan shall be authorized and approved pursuant to this article the court shall retain jurisdiction of such proceeding and thereafter no creditor whose claim is included in such adjustment or composition shall be authorized to bring any action or proceeding of any kind or character for the enforcement of his claim except with the permission of the supreme court and then only to recover and enforce the rights given him by the adjustment or composition.

"52:27-39. *Reduction in principal of outstanding notes or bonds prohibited.* Notwithstanding any provisions of this article the commission shall not approve any adjustment or composition, or plan presented pursuant to this article, which provides for the reduction in the principal amount of any outstanding notes or bonds of the municipality."

The question raised before the Court of Errors and Appeals of the State of New Jersey and before the New Jersey Supreme Court was the validity of the statute above quoted on the ground that said statute as construed and applied was repugnant to Article I, Section 10 of the Constitution of the United States and to the Fourteenth Amendment thereto. Appellants contend that the judgment and decision of the Court of Errors and Appeals of the State of New Jersey is in favor of the validity of said statute as construed and applied, and therefore that said judgment and decision may be reviewed by the Supreme Court of the United States on appeal.

3. The judgment of the Court of Errors and Appeals of the State of New Jersey here sought to be reviewed was entered on September 19, 1941, and the date upon which the application for the appeal was presented was December 15, 1941.

4. The question involved in this cause is whether the New Jersey statute above quoted, as construed and applied by

the courts of that state to permit a compulsory adjustment and composition of the debts of a municipal corporation, which debts were incurred and created before the enactment of the statute, is unconstitutional as applied to a dissenting creditor because it impairs the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States and is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States.

This question was raised in the pleadings in the New Jersey Supreme Court, the court of first instance, and was also raised on appeal to the Court of Errors and Appeals of the State of New Jersey.

Appellants' complaint in the New Jersey Supreme Court sought to recover on certain over-due bonds and coupons issued by the respondent, the City of Asbury Park, a municipal corporation organized and existing under the laws of the State of New Jersey. Said bonds were issued by said respondent in the years 1929 and 1930, long before the enactment of the statute here involved, bore interest at the rate of five and three-quarters per cent or six per cent per annum, and were due and payable in the years 1933, 1934 or 1935.

Respondent's answering pleading set up as a defense to appellants' claim that, pursuant to and in accordance with the terms of the New Jersey statute above quoted, a refunding plan was adopted by respondent on April 29, 1938, and put into operation on June 15, 1938. Under the terms of said plan of adjustment and composition so adopted, respondent agreed to pay all interest on outstanding bonds at the contract rate up to and including December 31, 1933, to pay all interest for the years 1934, 1935, 1936 and until December 1, 1937, at the rate of three per cent per annum, and to issue new bonds to bondholders in exchange for their outsfanding bonds, which new bonds were to be dated

December 1, 1937, were to mature in 1966, and were to bear interest at the rate of four per cent per annum. It was alleged that as a result of the adoption of said plan, the provisions of the statute here involved operated to make said plan binding upon all creditors of the respondent, including appellants, prevented suit to enforce any rights other than those given by said plan, and prohibited such suit except with the permission of the New Jersey Supreme Court obtained in accordance with Section 52:27-38 of the statute, which permission had not been secured by appellants in this cause.

In reply to said answering pleading, appellants alleged that they had never approved or consented to said refunding plan and that they had never appeared or been represented in any of the proceedings in the New Jersey Supreme Court in connection with its adoption. Said appellants further alleged that said plan was not binding upon them and constituted no defense to their suit because the statute under which said plan was adopted was unconstitutional and void as to appellants, among other reasons, because it was a statute impairing the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States and because it deprived appellants of their property without due process of law, denied appellants the equal protection of the laws and abridged the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States.

The question thus raised was argued before the New Jersey Supreme Court which rendered judgment in favor of the respondent. In its opinion, reported in 19 N. J. Misc. Rep. 322, a copy of which is attached hereto, the court stated that it was not necessary to determine the constitutionality of the statute insofar as the provisions thereof in abrogation of appellants' contractual rights, were con-

cerned. It held, however, that appellants' suit could not be maintained because appellants had not secured the permission of the New Jersey Supreme Court to institute suit in accordance with section 52:27-38 of the statute. The effect of this holding, therefore, was to sustain the validity of the entire statute as well as section 52:27-38.

An appeal was taken to the Court of Errors and Appeals of the State of New Jersey and appellants assigned as grounds of appeal, among others, the constitutional objections raised in the proceedings below. The Court of Errors and Appeals considered these constitutional objections but affirmed the decision of the New Jersey Supreme Court, holding that the statute was a valid exercise of the police powers of the State of New Jersey and that it did not impair the obligation of appellants' contracts. A copy of the opinion of the Court of Errors and Appeals, reported in 127 N. J. L. (Adv. Rep.) 239, is attached hereto.

Before each of these courts, therefore, appellants urged that the statute quoted above as construed and applied was invalid and unconstitutional under Article I, Section 10 of the Constitution of the United States and a violation of appellants' rights and privileges under the Fourteenth Amendment thereto. Each tribunal held that the question was properly raised before it and rendered a decision adverse to the appellants, sustaining the validity of the statute.

Decisions of the Supreme Court of the United States which sustain the jurisdiction of the Supreme Court of the United States to review this cause upon appeal are: *Ashton* v. *Cameron County Water Improvement District No. 1*, 298 U. S. 513, 80 L. ed. 1309 (1936); *United States* v. *Bekins*, 304 U. S. 27, 82 L. ed. 1137 (1938); *Sturges* v. *Crowninshield*, 4 Wheat. 122, 4 L. ed. 529 (1819); *Ogden* v. *Saunders*, 12 Wheat. 213, 6 L. ed. 806 (1827); *Baldwin* v. *Hale*, 1 Wall. 223, 17 L. ed. 531 (1864); *Baldwin* v. *Bank of Newbury*, 1 Wall. 234, 17 L. ed. 534 (1864); *Denny* v. *Bennett*, 128 U. S.

489, 32 L. ed. 491 (1885); *International Shoe Co.* v. *Pinkus*, 278 U. S. 261, 73 L. ed. 318; *United States* v. *Mayor of New Orleans*, 103 U. S. 358, 26 L. ed. 395 (1881); *Louisiana* v. *Pilsbury*, 105 U. S. 278, 26 L. ed. 1090 (1882); *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, 78 L. ed. 413 (1934); *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, 78 L. ed. 1344 (1934); *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, 79 L. ed. 1298 (1935).

The purpose and effect of the New Jersey statute above quoted is to permanently wipe out the old obligations of a municipality and to compel non-assenting creditors to accept what a composition effected thereunder gives them. It is in effect a state municipal bankruptcy act, granting a discharge to the municipality by forbidding suit upon old obligations issued before the enactment of the statute. In this case, the statute and the plan adopted thereunder operate to permit the most flagrant kind of impairment of the obligation of appellants' contracts. Appellants are prohibited from enforcing their bonds or from recovering accrued interest thereon, and, in place of their old obligations which were issued long before the statute was passed and which had fallen due before the composition plan under the statute had been adopted, are forced to accept new bonds maturing some thirty years later and bearing a much lower interest rate.

The decisions of the Supreme Court of the United States above cited clearly establish that a state bankruptcy act such as this one, discharging contracts made before the passage of the act, is unconstitutional as impairing the obligation of contracts and cannot be sustained as a reasonable exercise of the police powers of the state.

Two recent decisions of this Court contain dicta directly in point condemning such legislation as violative of the Federal Constitution. In *Ashton* v. *Cameron County Water Improvement District No. 1*, 298 U. S. 513, 80 L. ed. 1309

(1936) and *United States* v. *Bekins*, 304 U. S. 27, 82 L. ed. 1137 (1938), the Court passed upon the constitutionality of the first and second Federal Municipal Bankruptcy Acts; the first act was held unconstitutional in the *Ashton* case and the second act was held valid in the *Bekins* case. In each decision this Court expressly stated that legislation effecting a compulsory composition of the indebtedness of a municipal corporation was beyond the constitutional powers of a state to enact.

In the *Ashton* case, a five to four decision, both the majority by Mr. Justice McReynolds and the minority by Mr. Justice Cardozo explicitly so held, citing as authority the leading case of *Sturges* v. *Crowninshield*, 4 Wheat. 122, 4 L. ed. 529 (1819). Mr. Justice McReynolds said (298 U. S. 513 at p. 531):

> "The Constitution was careful to provide that 'No State shall pass any Law impairing the Obligation of Contracts.' This she may not do under the form of a bankruptcy act or otherwise. Sturges *v.* Crowninshield, 4 Wheat. 122, 191."

Mr. Justice Cardozo said (298 U. S. 513 at p. 534):

> "Nor was there hope for relief from statutes to be enacted by the states. The Constitution prohibits the states from passing any law that will impair the obligation of existing contracts, and a state insolvency act is of no avail as to obligations of the debtor incurred before its passage. Sturges *v.* Crowninshield, 4 Wheat. 122. Relief must come from Congress if it is to come from any one."

In the *Bekins* case, a six to two decision with Justices McReynolds and Butler dissenting, Chief Justice Hughes, writing for the majority, said (304 U. S. 27, at p. 53, *et seq.*):

> "In the instant case we have cooperation to provide a remedy for a serious condition in which the States alone were unable to afford relief.
>
> * * * * * * *

"The natural and reasonable remedy through composition of the debts of the district was not available under state law by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation * * * The State acts in aid, and not in derogation, of its sovereign powers. It invites the intervention of the bankruptcy power to save its agency which the State itself is powerless to rescue."

Statutes of other States, similar in purpose and scope to the New Jersey compulsory composition statute here involved, have also been condemned by State courts as unconstitutional on the grounds here urged by appellants. *Pryor* v. *Goza*, 172 Miss. 46, 159 So. 99 (1935); *Los Angeles County* v. *John E. Rockhold*, 3 Cal. (2d) 192, 44 P. (2d) 340 (1935).

It is respectfully submitted that there is basis upon which the Supreme Court of the United States has jurisdiction to review the judgment of the Court of Errors and Appeals of the State of New Jersey in this cause.

ARTHUR T. VANDERBILT,
Attorney for Appellants.

Dated: December 15, 1941.

EXHIBIT "A".

Filed March 28, 1941.

NEW JERSEY SUPREME COURT, ESSEX COUNTY.

FAITOUTE IRON & STEEL COMPANY, a Corporation, and MOSES W. FAITOUTE, *Plaintiffs*,

vs.

CITY OF ASBURY PARK, a Municipal Corporation, *Defendant*.

Opinion.

Arthur T. Vanderbilt, Attorney of Plaintiffs.
Ward Kremer, Attorney for Defendant.

SMITH, JOSEPH L., *S. C. C.*:

This comes on a motion of the defendant to strike the complaint filed herein as setting forth no legal cause of action. The plaintiffs' suit is to recover on bonds and interest coupons issued by the defendant and held by the plaintiffs. The grounds set forth in the motion to strike the complaint are that the complaint does not set forth a legal cause of action; that the complaint does not aver that the plaintiffs have obtained the permission of the New Jersey Supreme Court to institute the present suit; that the defendant has in operation a refunding plan controlling the plaintiffs' claim; that the plaintiffs are controlled by the terms and provisions of N. J. S. A. 52:27-34, *et seq.*; and that the plaintiffs have not obtained permission of the New Jersey Supreme Court to institute the present suit.

The procedural propriety of the motion is questionable in view of the fact that the complaint, on its face, without the qualification of extraneous matters, does set forth a cause of action, and the grounds stated in the motion would have been stated more properly by way of an answer. However, all the relevant facts are admitted by both parties and concededly there are no issues of facts to be determined, and solely a question of law is left for determination. Under these circumstances, the court will con-

sider the motion on the merits rather than on procedural grounds.

The defendant concedes the issuance of bonds now held by the plaintiffs; it shows, however, that on or about March 7th, 1935, it, the City of Asbury Park, was placed under the control of a Municipal Finance Commission, pursuant to N. J. S. A. 52:27-1, *et seq.*; thereafter, a plan for refunding of the bonded indebtedness of the city was filed with the New Jersey Supreme Court, pursuant to N. J. S. A. 52:27-34, *et seq.*, whereupon the Supreme Court assumed jurisdiction over the proceedings.

In due course the court approved the refunding plan, subject to the approval of the plan by 85% or more, in amount of the indebtedness affected by the plan. Subsequently, the necessary percentage of consents was obtained, and the plan was put into operation on June 15th, 1938. The contention of the defendant is that the claim or interests of the plaintiffs, are governed and controlled by the said plan. Justice Perskie, in his order approving the modified plan of adjustment, under date of April 29th, 1938, states that:

"It (referring to the plan) is not detrimental to other creditors of the municipality."

The said order also provides that the Supreme Court shall retain jurisdiction over the proceedings, in accordance with the statutes and for the purpose of determining such matters as are provided under the said amended refunding plan for the court's determination.

The plaintiffs contend that the statute in question, under which the proceedings in the Supreme Court were held, and upon which would be based the defendant's defense, are unconstitutional.

Under the circumstances stated, it is not necessary to determine the constitutionality of N. J. S. A. 52:27-1, -34, *et seq.*, insofar as the provisions thereof, in abrogation of contractual rights of plaintiffs, are concerned. The statute in question, 52:27-38, provides that the Supreme Court shall retain jurisdiction over the proceedings even after the entry of the order approving the adjustment; that thereafter no creditor shall bring action without the per-

mission of the Supreme Court. In compliance with this statute, our Supreme Court, under the order of Mr. Justice Perskie, has accepted and retained jurisdiction over the proceedings, even as to subsequent actions,

"In accordance with the statute in such cases made and provided—."

In the face of our Supreme Court having assumed jurisdiction over the matter and having expressly retained such jurisdiction for further proceedings, this court will require compliance with the provisions of that order, and with the provisions of the statute requiring that permission of the Supreme Court be obtained prior to the bringing of such an action. Such permission concededly lacking in the case, the motion to strike the complaint will be granted: an order will be entered accordingly.

(Signed) JOSEPH L. SMITH,
Supreme Court Commissioner.

March 27th, 1941.

EXHIBIT "B".

New Jersey Court of Errors and Appeals No. 27, May Term, 1941.

FAITOUTE IRON & STEEL COMPANY, a Corporation, and MOSES W. FAITOUTE, Appellants,

v.

CITY OF ASBURY PARK, a Municipal Corporation, Respondent.

Submitted May, 1941. Decided Sep. 19, 1941.

On Appeal From Supreme Court.

For appellant, Arthur T. Vanderbilt, John A. Ackerman, G. Dixon Speakman.

For respondent, Ward Kremer.

The opinion of the court was delivered by Bodine, J.

The appeal is from an order striking the complaint. It contained four counts. The corporation and the individ-

ual plaintiffs are both residents of this state and are the owners of certain bonds issued by the defendant municipality which are in default and have not been paid as agreed. The city moved to strike the complaint, in that the city had in operation an approved refunding plan and the payment of the bonds in suit was controlled thereby pursuant to N. J. S. A. 52:27-1, et seq. and N. J. S. A. 52:27-34 et seq., and lastly that permission of the New Jersey Supreme Court, a statutory requisite, to the institution of the present proceeding had not been obtained.

It appears that on March 7, 1935, the City of Asbury Park was placed under the control of the Municipal Finance Commission pursuant to the provisions of N. J. S. A. 52:27-1 et seq. The city was, at that time, in default in the payment of interest on its bonded indebtedness. On February 1, 1936, a plan for the refunding of its bonded debt was filed in the Supreme Court pursuant to the terms and provisions of N. J. S. A. 52:27-34 et seq. and the court took jurisdiction of the proceedings. The plan provided for the refunding of $10,750,000 of outstanding bonds and included among the bonds to be refunded were the bonds mentioned in the complaint. The plan, as amended, was approved by an order dated July 21, 1937. The order provided that the plan should, before becoming effective, be approved by creditors representing eighty-five per centum in amount of the indebtedness affected and approval to be evidenced in writing, in accordance with the terms and provisions of the statute in such case made and provided (N. J. S. A. 52:27-36).

On September 28, 1937, the Municipal Finance Commission of this State, by resolution, approved the amended plan, providing the requisite number of creditors should consent thereto in accordance with the statute.

On April 29, 1938, creditors representing in excess of eighty-five per centum in amount of the indebtedness affected consented to the plan, so that an order was then entered in the court approving the refunding plan and approving the adjustment or composition therein contained in accordance with the statute (N. J. S. A. 52:27-36).

The refunding plan was put into operation June 15, 1938, and the bondholders, who had consented in writing to

the terms and provisions of the refunding plan, exchanged their outstanding bonds for new bonds issued to them in accordance with the terms of the plan.

The plan seems to have been fair and in all respects equitable.

The first question for us to determine is: Could the court strike the complaint which alleged a perfectly good cause of action and, which, without proof of the refunding plan, would have stood?

The adoption of the refunding plan under the circumstances of this case, was or was not a defense which barred the action. Such a defense, since it goes to the whole action, should have been raised by answer. The complaint, as before noted, did not fail to state a cause of action and it was not sham. The statute provides when a complaint may be struck (N. J. S. A. 2:27-125). A motion to strike, like a common law demurrer, admits every fact well pleaded; so it is a curious departure to strike a complaint because of allegations contained in affidavits filed by the moving party. The proper practice is suggested in the following cases: Gross *v.* New York C. R. R. Company, 99 N. J. L. 414; Brooks *v.* Metropolitan Life Insurance Company, 70 Id. 36; Fidelity Union Trust Company *v.* Pavlovsky, 17 17 N. J. Misc. 10; Koewing *v.* West Orange, 89 N. J. L. 539; Tanis *v.* Passaic County, 122 Id. 486; Lully *v.* National Surety Company, 106 Id. 81, 83.

The point is also made that the affidavits used state opinions and not fact. This, of course, is ordinarily a fatal defect. The real question was the constitutionality of the refunding act. The material facts in the case are not in dispute. We will treat the pleadings as though amended and consider the merits since the question presented is one which should be speedily determined. If there had been a disputed fact issue the court, in the absence of consent, could not have passed upon the merits. Standard Radio Corporation *v.* Triangle Radio &c., 125, N. J. L. 131.

This brings us to the constitutional question. Appellant argues that the composition statute (N. J. S. A.) 52:27-34, 39) is unconstitutional since it impairs the obligation of contract. We have held its predecessor not faulty. Hourigan *v.* North Bergen Township, 113, N. J. L. 143.

Mr. Justice Heher, in that case, said of the statute: "The act confers upon the finance commission, in respect of the municipality's financial affairs, powers somewhat akin to those exercised by receivers of insolvent corporations. * * * Its primary purpose is to keep intact the corporate structure, and to continue municipal function until rehabilitation can be effected. This is, of necessity, a proper legislative function, and the rights of creditors, in such a situation, are secondary. It is a proper exercise of police power. It is a well established doctrine that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts entered into between individuals may thereby be affected." Hourigan *v.* North Bergen Township, 113 N. J. L. 149.

N. J. S. A. 52:27-65 is as follows: "It is declared that this chapter is intended by the legislature to meet the public emergency arising from a default in the payment of municipal and school district obligations and the resulting impairment of public credit, requiring intervention by the state to provide for the payment of existing obligations in such a way as to cause the least embarrassment to property owners as taxpayers, and that this chapter is remedial in nature and the powers hereby granted shall be liberally construed."

At the time of the adoption of the plan, pursuant to the statute, the credit of Asbury Park had suffered greatly. The bonds issued to the plaintiffs long before the enactment of the statute had little value. The new bonds issued under the plan are not in default and there is a very substantial market for them.

It is argued that a municipal bankruptcy act is within the exclusive jurisdiction of Congress. United States *v.* Bekins, 304 U. S. 27. The statute there approved was passed in 1937 (50 Stat. 654). Our statutes were of 1931-1933 origin.

The court proceedings thereunder were initiated February 1, 1936. No obligation of contract was discharged, but provision was made, under the supervision of compe-

tent judicial authority, for the collection of the debts owed by a municipality then in default by a fair means. How little the bondholder's right is changed is illustrated by Lyon *v.* Elizabeth, 43 N. J. L. 158; Piscataway Two *v.* First National Bank of Dunellen, 111 Id. 412; Vanderpool *v.* Mount Ephriam, Id. 423.

The holder of a defaulted municipal bond, before the statute, could take judgment and enforce payment only by mandamus, a discretionary writ. Under the plan in question, a bondholder secures a new remedy for an existing right—a remedy uniform to all in the same class and well within the legislative power. If we assume the act had not been passed and all bondholders had secured judgments, they would then have had to go to the Supreme Court for writs of mandamus to secure payment. The court would, no doubt, have provided some means of enforcing the judgments so as to do no irreparable public injury. What more appropriate than a legislative plan to secure payment under the supervision of a commission and the court. The plan is fair alike to the bondholders and the citizens dependent upon good government. Of course, priorities cannot be destroyed under such a plan. State ex rel Phelps *v.* Fort Lee, 14 N. J. Misc. 895, affirmed 191 Atl. Rep. 836.

Lastly, we cannot regard the federal enactment as one that puts to sleep the state power to provide an equitable means for the collection of municipal obligations, or as invalidating a prior proceeding taken under a state statute in good faith. It is not to be supposed that the sovereign may not provide a means which insures payment of defaulted municipal obligations in an orderly manner.

The judgment is affirmed with costs.

Endorsed: "Filed Sep. 19, 1941. J. A. Brophy, Clerk."